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IN THE

Supreme Court of the United States

October Term, 1969

No. 492

UNITED STATES OF AMERICA,

Respondent,

against

TWO TRACTS OF LAND IN THE TOWN OF BROOKHAVEN, COUNTY OF SUFFOLK, STATE OF NEW YORK, and SAILORS HAVEN FIRE ISLAND, INC., *et al.*,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND APPENDICES

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on May 26, 1969.

Citations to Opinions Below

The judgment of the District Court is unreported and is printed as Appendix B-1 hereto, p. A12, *infra*. No opinion was rendered by the District Court. The opinion of the Court of Appeals is unreported and is printed in Appendix B-2 hereto, p. A14, *infra*.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 26, 1969. Rehearing was denied on June 11, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

Questions Presented

1. May evidence, such as a prior vouched-for appraisal, admissible under the applicable state and Federal rules of evidence, be excluded from a jury trial of a condemnation action commenced by the United States, on the grounds that the introduction of such appraisal would be "counter to governmental policy," in effect a form of executive privilege, even though such appraisal was used, not only to induce the consent of Congress to authorize the condemnation of Petitioner-Defendant's* property, but was also made available to the Claimant prior to the taking and used to obtain its consent to the taking, which consent was necessary under the statute authorizing the taking?

2. Was the exclusion of such appraisal, under the circumstances, of such essential unfairness as to deny Claimant due process of law and just compensation?

Statutes and Rules Involved

This Petition involves the construction and application of the Fire Island National Seashore Act, Public Law 88-587, 78 Stat. 92 (1964), Fifth Amendment to the United States Constitution and Rule 43(a) of the Rules of Civil Procedure.

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* In order to more clearly define the nature of petitioner's position in this action, it will be referred to as "Claimant."

Public Law 88-587 is printed in full in Appendix A to this Petition. Section 2(e), which establishes a "condemnation by consent" procedure is set out below:

"(e) With one exception the Secretary shall not acquire any privately owned improved property or interests therein within the boundaries of the seashore or any property or interests therein within the communities delineated on the boundary map mentioned in section 1, except beach waters and adjoining land within such communities which the Secretary determines are needed for public access to the beach, without the consent of the owners so long as the appropriate local zoning agency shall have in force and applicable to such property a duly adopted, valid, zoning ordinance that is satisfactory to the Secretary. The sole exception to this limitation on the power of the Secretary to condemn improved property where appropriate zoning ordinances exist shall be in the approximately eight-mile area from the easterly boundary of the Brookhaven town park at Davis Park, in the town of Brookhaven, to the westerly boundary of the Smith Point County Park. In this area only, when the Secretary deems it advisable for carrying out the purposes of this Act or to improve the contiguity of the park land and ease its administration, the Secretary may acquire any land or improvements therein by condemnation. In every case in which the Secretary exercises this right of condemnation of improved property the beneficial owner or owners (not being a corporation) of any improved property so condemned, provided he, she, or they held the same or a greater estate in the property on July 1, 1963, may elect as a condition of such acquisition by the Secretary any one of the following three alternatives:

78 Stat. 929, 78 Stat. 930.

(1) that the Secretary shall take the said property in fee simple absolute and pay the fair market value thereof as of the date of such taking;

(2) that the owner or owners shall retain a life estate in said property, measured on the life of the sole owner or on the life of any one person among multiple owners (notice of the person so designated to be filed in writing with the Secretary within six months after the taking) or on the life of the survivor in title of any estate held on July 1, 1963, as a tenancy by the entirety. The price in such case shall be diminished by the actuarial fair market value of the life estate retained, determined on the basis of standard actuarial methods;

(3) that the owner or owners shall retain an estate for twenty-five years. The price in this case shall likewise be diminished by the value of the estate retained."

The Fifth Amendment provides as follows:

"*Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 43(a) provides as follows:

> "(a) *Form and Admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the court of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

Statement of Case

(a) Property

This case arose as a result of the condemnation of Claimant's property pursuant to Public Law 88-857, 78 Stat. 928, for the purpose of acquiring land for the Fire Island National Seashore. Claimant's property consisted of three separate segments, including (i) an improved parcel of approximately 10 acres, (ii) an unimproved parcel of approximately 20 acres and (iii) an underwater parcel of approximately 25 acres.

(b) Negotiations and Consent of Claimant

Public Law 88-857 is an unusual statute in that, while the Secretary of the Interior is authorized to acquire land for the National Seashore under section 2(e) of that act,

he may not acquire improved property "without the consent of the owners".*

Prior to the condemnation of Claimant's property, the National Park Service of the Department of Interior attempted to negotiate the purchase of Claimant's property on Fire Island. It was clear during all negotiations that while the Government had the power to take the unimproved upland and underwater lands, it could not, without Claimant's consent, vest title to the improved parcel. An offer of $600,000—some $225,000 more than the amount awarded by the jury—was made to Claimant and rejected (A40, *infra*).**

On December 6, 1965, Claimant consented to the condemnation of the improved parcel provided that its other property also be taken. On December 17, 1965, the Department of the Interior requested that Claimant obtain an appraiser and meet with the Park Service to negotiate (A39, *infra*).

In a letter to the Secretary of the Interior dated March 3, 1966, Claimant's attorney indicated that the parties had met as agreed upon, that the property had been re-evaluated by the Government's appraiser, Joseph J. Blake, and that a final offer in the sum of $600,000 had been made; inasmuch as Claimant's appraisal was in excess of $900,000, the Government's offer was rejected. Claimant then requested action on its earlier consent to the condemnation (A40, *infra*).

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* Claimants' research can find only one other instance of condemnation by consent. See 57 Stat. 565, 42 U.S.C. §1534 (wartime amendment to Lanham Act), discussed in *United States* v. *Certain Parcels of Land in Fairfax County*, 245 U.S. 344 (1953), *rehearing denied*, 345 U.S. 960.

** Reference is to page A40 of Appendix C to this petition which contains extracts of testimony and argument before the trial court.

Mr. Blake's appraisal report and value was disclosed to Claimant during the negotiations leading up to Claimant's consent and was a vital part of such discussions. Indeed, it is Claimant's contention that without knowledge of this appraisal and the belief that it would be used at the trial, Claimant would not have consented to such condemnation.

On May 2, 1966, the Government vested title by consent to *all* of the Fire Island property owned by Claimant.

(c) The Trial

During the trial, Claimant's appraiser testified that in his opinion, Claimant's property was valued at $985,000 at the time of vesting.

The Government presented only one expert appraiser witness, Louis Modica, and not Joseph J. Blake. Mr. Modica valued Claimant's property at only $300,000.

(d) The Blake Appraisal

At the trial, Claimant's attorneys subpeonaed Joseph Blake, the Assistant U.S. Attorney trying the case, and Leslie W. Piel, the regional real estate officer of the National Park Service, to produce Mr. Blake's appraisal used in the negotiations to obtain Claimant's consent to the condemnation (A22, *infra*). This appraisal was offered by Claimant's attorney as an admission against interest. The offer was rejected by the trial court. Claimant later made an offer of proof to the trial court maintaining that the Blake appraisal had been vouched for by the Government since it had been utilized by them in obtaining funds from

the Congress.* This offer was likewise rejected by the trial court.

The court specifically refused to admit the Blake appraisal as an admission against interest by the Government despite the offer of proof (A29, *infra*).

(e) The Verdict

The jury verdict resulted in an award of $375,000, $225,000 less than the offer in December 1965, based on the Blake appraisal.

(f) Motion to Set Aside Verdict

On April 10, 1968, Claimant's oral motion to set aside the verdict was argued. The entire argument is contained in the record. *Inter alia,* Claimant contended that it was error for the trial court to refuse to admit the Blake appraisal. That motion was denied.

Reasons for Granting the Writ

This application raises two important questions on which a decision by this Court is needed, one evidentiary and one constitutional.

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* On June 10, 1963, the Secretary of Interior advised Congress that

> "'Based upon studies thus far made, the aggregate area of the national seashore will be approximately 8,000 acres, and we believe that land acquisition costs probably will not exceed $20 million. The data required by the act of July 25, 1965 (5 U.S.C. 642a), are enclosed."

Senate Report 1300, 88th Congress, 21 Sess., at p. 7.

The evidentiary question is to the extent to which materials prepared by the executive branch of the Government to induce legislative action by the Congress may be excluded from use as evidence in Federal court litigation to which the Government is a party on the grounds of executive privilege or public policy. The Court of Appeals' decision here on grounds of public policy, a new privilege excluding related and admittedly admissible evidence. This is contrary to the underlying philosophy of recent Federal cases, including cases of this Court, which favors expanding the scope of admissibility and limiting the scope of exclusion on grounds of executive privilege to matters of national security and confidential intra-governmental correspondence. However, the extent to which executive privilege remains available in non-national security cases, if at all, has not been defined. This case presents the Court with an excellent opportunity to define the scope of the privilege in such cases. The lower courts are clearly in need of such guidance on this important issue; in many respects their decisions and philosophies are in conflict.

The constitutional issue arises from the use of the excluded appraisal to induce the Claimant to give its consent to the taking, without which consent there could have been no taking under the statute, as well as to induce Congress to appropriate the necessary funds. The subsequent suppression of the appraisal raises serious questions of essential fairness necessary to meet the constitutional requirement of just compensation. This Court has never ruled on the degree of fairness which the United States must exercise when taking the private property of its citizens for a public purpose. This issue is thus an important question of Federal law which should be settled by this Court.

POINT I

This Court has not clearly defined the scope of executive privilege to be accorded the Government in litigation with its citizens.

Although we now live in an era of ever increasing governmental power, this Court has never fully defined the scope of executive privilege to be granted the Government in court actions between it and its citizens. More particularly, this Court has never fully addressed itself to the problem of granting executive privilege to exclude otherwise admissible evidence* which does not pertain to national security.

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* The appraisal which was excluded in the instant case would clearly be admissible as an "admission against interest" under both Federal and state rules of evidence. See Advisory Committee's Note to Rule 8-01 of the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates (March 1969), ("Under established principles, an admission may be made by adopting or acquiesing in the statement of another."). See also *Pekelis* v. *Transcontinental Western Air*, 187 F. 2d 122, 128-9 (2d Cir. 1951), *cert. denied*, 341 U.S. 951 (report of a corporate employee submitted to the Civil Aeronautics Board by the corporation); *United States* v. *United Shoe Mach. Corp.*, 89 F. Supp. 349, 352 (D. Mass. 1950) (statement of a corporate employee admissible if "adopted or if the corporation conducted its business on basis of such statement."). Under Rule 43(a) of the Federal Rules of Civil Procedure, the appraisal is also admissible if admissible under state rules of evidence. See the following New York State cases in which prior vouched-for appraisals were held to be allowable as admissions against interest upon making a proper foundation: *Matter of City of New York (Bleecker Street)*, 143 M. 2d 173, 250 N.Y.S. 2d 664, 666 (Sup. Ct. 1964) (appraisal prepared by City Real Estate Department and submitted to Board of Estimate); *City of Buffalo* v. *Stozzi*, 54 M. 2d 1031, 283 N.Y.S. 2d 919, 922 (Sup. Ct. 1967); *Matter of City of New York (Throgs Neck Expressway)*, 16 A.D. 2d 570, 229 N.Y.S. 2d 947, 953 (1st Dept. 1962), *reversed on other grounds*, 13 N.Y. 2d 700 (1965); *City of Watertown* v. *Jerry's Watertown Restaurant & Hotel, Inc.*, decided May 25, 1967, Sup. Ct., Jefferson Co., *aff'd, without option*, 30 A.D. 2d 585, 290 N.Y.S. 2d 18 (4th Dept. 1968); *City of Binghamton* v. *Arlington Hotel, Inc.*, 30 A.D. 2d 585, 290

The last occasion in which executive privilege was considered by this Court was *United States* v. *Reynolds*, 345 U.S. 1 (1953). *Reynolds* is not controlling here, since the Court specifically refused to rule on the broad contention raised by the Government that "the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest". 345 U.S. at 6. Instead the Court chose to rely on the narrow—and generally conceded—ground that the Government is privileged not to divulge matters relating to national security. Similarly, earlier cases interpreting the validity of Federal "housekeeping" regulations are not in point on the question presented here. See *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951); *Boske* v. *Comingore*, 177 U.S. 459 (1900). *Jencks* v. *United States*, 353 U.S. 657 (1957), dealing as it does with criminal investigations, is also not in point.

The lower courts have attempted to define the circumstances in which the Government may exercise its executive privilege—if indeed any such privilege does exist—in matters not relating to the national security, but the results have been contradictory. *Compare, Kaiser Aluminum & Chemical Corp.* v. *U.S.*, 157 F. Supp. 939, 947 (Ct. Cl. 1958) where Mr. Justice Reed formulated the public policy involved in a claim of privilege for the "administrative reasoning process" protecting "open, frank discussion

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N.Y.S. 2d 360, 352 (3rd Dept. 1968); *Matter of East Houston Street Area Houses*, N.Y.L.J., Oct. 29, 1968, p. 17, col. 4 (Sup. Ct.) ("The courts have formulated a rule that the general basis for the admission of any prior appraisals is an admission against the condemnee when it appears that the condemnor has adopted and used such prior appraisals.")

between subordinate and chief concerning administrative action" and *Davis* v. *Braswell Motor Freight Lines, Inc.*, 363 F. 2d 600 (5th Cir. 1966) ("intra-agency correspondence" privileged); *Machin* v. *Zuckert*, 316 F. 2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 ("confidential" material privileged) *with Mitchell* v. *Bass*, 252 F. 2d 513 (1958) (privilege denied where United States was third party and disclosure "could not result in any serious prejudice to the Secretary" of Labor); *Campbell* v. *Eastland*, 307 F. 2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 ("Executive privilege is narrowly confined to matter affecting national security, such as military and state secrets. It must not be invoked lightly.")

In light of past experience with the lack of a clear definition of executive privilege, the decision of the Second Circuit for which certiorari is sought becomes all the more disturbing. Past applications of executive privilege usually relied on confidential relationships or the necessity to protect the correspondence necessary for orderly administrative decisions. The "governmental policy" alluded to by the Circuit Court can be viewed as nothing else but a privilege for the executive branch in dealing with the legislative branch. Thus, for the very first time, a form of executive privilege has been extended beyond the traditional scope of national security and the need for confidential decision making. The appraisal denied admission in the instant case is neither confidential—its conclusion was fully disclosed to both the Congress and the Claimant—or necessary for the making of an internal administrative decision. Even more disturbing is the implication of the Circuit Court's decision that one branch of the Government must be protected in deceiving another:

"while federal agencies have a duty to give Congress as accurate a notion of the cost of a project as they feasibly can, certainty is impossible and the agencies doubtless recognize it to be better to err on the high side rather than the low. While an error on the high side will mean only that some of the appropriation will not be used, one on the low side may involve the Government in a project that Congress would not have authorized if properly apprised of the facts:" Appendix B-2, p. A20, *infra*.

Moreover, the above reasoning seems to defy the rational experience of man as a political animal. Few serious observers of government can recall instances in which the authorization of government projects, after the submission of data from executive agencies, proved too high rather than too low. The instant case is a prime example of the unlikelihood of this. It scarcely merits belief that the Interior Department, after many years of seeking to obtain authorization for the Fire Island National Seashore, sought to convince Congress of the desirability of authorizing it by deliberately over-estimating the cost of acquisition—to the extent of 100%.

Lacking a strong policy reason for permitting a new privilege to be grafted on to the federal rules of evidence, this Court should grant certiorari here in order to safeguard the continued liberal admissibility of evidence in Federal courts and to clearly define the full scope of executive privilege, so that the lower Federal courts may be properly guided.

POINT II

This Court should take certiorari of this appeal to establish a rule as to the essential fairness necessary for the taking of property by due process and the payment of just compensation.

Property can only be taken for a public use by "due process of law" and with "just compensation." U.S. Constitution, Amendment V. Thus, by constitutional mandate, compensation by itself is not sufficient; justice in the sense of fairness and equality is necessary. This Court has already noted in condemnation cases that:

> "The words 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equality' * * *" *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 124 (1949). See also *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 631 (1961).

Put in its simplest form, Claimant wishes this Court to hold that the Government cannot trick a citizen to obtain what it desires. The rules of evidence, we submit, must be structured to prevent, rather than assist, any such executive over-reaching.

The Circuit Court noted that for the Government, in its dealings with Congress, it is "better to err on the high side rather than on the low." But what of the Government's dealings with the Claimant? It cannot seriously be argued that in inducing Claimant's consent, it was better to supply high appraisals—which it did not intend to use on the trial.

The very notion that the Government could use a higher appraisal for one aspect of its dealings with Claimant—

obtaining its consent to a condemnation which it could have forestalled by simply refusing to consent—and then turn around and use an appraisal valuing Claimant's property at exactly half of the earlier appraisal surely must strike fair-minded persons as a deceitful endeavor which our Government has no business engaging in. Consistency is not always a virtue, and we do not here argue that the Government was bound by the earlier appraisal. But, having used it in its pre-litigation dealings with Claimant, which seriously changed its position in reliance on it, the attempt by the Government to hide from the jury the fact that it previously adopted the Blake appraisal as its own, is a clear violation of the essential fairness which must always be a party of "due process" and "just compensation."

This Court has never ruled on the kind and quality of non-judicial relationships between the Government and a condemnee which may affect the due process with which his property is taken and just compensation paid.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Public Law 88-587, 88th Congress, S. 1365
September 11, 1964

AN ACT

To establish the Fire Island National Seashore, and for other purposes.

Fire Island National Seashore Establishment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That (a) for the purpose of conserving and preserving for the use of future generations certain relatively unspoiled and undeveloped beaches, dunes, and other natural features within Suffolk County, New York, which possess high values to the Nation as examples of unspoiled areas of great natural beauty in close proximity to large concentrations of urban population, the Secretary of the Interior is authorized to establish an area to be known as the "Fire Island National Seashore".

Boundaries.

(b) The boundaries of the national seashore shall extend from the easterly boundary of Robert Moses State Park eastward to Moriches Inlet and shall include not only Fire Island proper, but also such islands and marshlands in the Great South Bay, Bellport Bay, and Moriches Bay adjacent to Fire Island as Sexton Island, West Island, Hollins Island, Ridge Island, Pelican Island, Pattersquash Island, and Reeves Island and such other small and adjacent islands, marshlands, and wet lands as would lend themselves to contiguity and reasonable administration within the national seashore and, in addition, the waters surrounding said area to distances of one thousand feet in the Atlantic Ocean and up to four thousand feet in Great South

Bay and Moriches Bay, all as delineated on a map identified as "Fire Island National Seashore No. OGP-0002", dated June 1964. The Secretary shall file said map with the Federal Register, and it may also be examined in the offices of the Department of the Interior.

Acquisition of land. 78 Stat. 928, 78 Stat. 929.

SEC. 2. (a) The Secretary is authorized to acquire, and it is the intent of Congress that he shall acquire as appropriated funds become available for the purpose or as such acquisition can be accomplished by donation or with donated funds or by transfer, exchange, or otherwise, the lands, waters, and other property, and improvements thereon and any interest therein, within the boundaries of the seashore as established under section 1 of this Act. Any property or interest therein owned by the State of New York, by Suffolk County, or by any other political subdivision of said State may be acquired only with the concurrence of such owner. Notwithstanding any other provision of law, any Federal property located within such area may, with the concurrence of the agency having custody thereof, be transferred without consideration to the administrative jurisdiction of the Secretary for use by him in carrying out the provisions of this Act. In exercising his authority to acquire property in accordance with the provisions of this subsection, the Secretary may enter into contracts requiring the expenditure, when appropriated, of funds authorized by this Act, but the liability of the United States under any such contract shall be contingent on the appropriation of funds sufficient to fulfill the obligations thereby incurred.

Publication in Federal Register.

(b) When the Secretary determines that lands and waters or interests therein have been acquired by the United States in sufficient quantity to provide an administrative

unit, he shall declare the establishment of the Fire Island National Seashore by publication of notice in the Federal Register.

(c) The Secretary shall pay not more than the fair market value, as determined by him, for any land or interest therein acquired by purchase.

(d) When acquiring land by exchange the Secretary may accept title to any nonfederally owned land located within the boundaries of the national seashore and convey to the grantor any federally owned land under the jurisdiction of the Secretary. The lands so exchanged shall be approximately equal in fair market value, but the Secretary may accept cash from or pay cash to the grantor in order to equalize the values of the lands exchanged.

(e) With one exception the Secretary shall not acquire any privately owned improved property or interests therein within the boundaries of the seashore or any property or interests therein within the communities delineated on the boundary map mentioned in section 1, except beach or waters and adjoining land within such communities which the Secretary determines are needed for public access to the beach, without the consent of the owners so long as the appropriate local zoning agency shall have in force and applicable to such property a duly adopted, valid, zoning ordinance that is satisfactory to the Secretary. The sole exception to this limitation on the power of the Secretary to condemn improved property where appropriate zoning ordinances exist shall be in the approximately eight-mile area from the easterly boundary of the Brookhaven town park at Davis Park, in the town of Brookhaven, to the westerly boundary of the Smith Point County Park. In this area only, when the Secretary deems it advisable for carrying out the purposes of this Act or to improve the contiguity of the park land and ease its administration, the Sec-

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78 Stat. 929, 78 Stat. 930.

(1) that the Secretary shall take the said property in fee simple absolute and pay the fair market value thereof as of the date of such taking;

(2) that the owner or owners shall retain a life estate in said property, measured on the life of the sole owner or on the life of any one person among multiple owners (notice of the person so designated to be filed in writing with the Secretary within six months after the taking) or on the life of the survivor in title of any estate held on July 1, 1963, as a tenancy by the entirety. The price in such case shall be diminished by the actuarial fair market value of the life estate retained, determined on the basis of standard actuarial methods;

(3) that the owner or owners shall retain an estate for twenty-five years. The price in this case shall likewise be diminished by the value of the estate retained.

"Improved property."

(f) The term "improved property" as used in this Act shall mean any building, the construction of which was begun before July 1, 1963, and such amount of land, not in

excess of two acres in the case of a residence or ten acres in the case of a commercial or industrial use, on which the building is situated as the Secretary considers reasonably necessary to the use of the building: *Provided,* That the Secretary may exclude from improved properties any beach or waters, together with so much of the land adjoining such beach or waters as he deems necessary for public access thereto.

Regulations.

SEC. 3. (a) In order to carry out the provisions of section 2, the Secretary shall issue regulations, which may be amended from time to time, specifying standards that are consistent with the purposes of this Act for zoning ordinances which must meet his approval.

(b) The standards specified in such regulations shall have the object of (1) prohibiting new commercial or industrial uses, other than commercial or industrial uses which the Secretary considers are consistent with the purposes of this Act, of all property within the national seashore, and (2) promoting the protection and development for purposes of this Act of the land within the national seashore by means of acreage, frontage, and setback requirements.

(c) Following issuance of such regulations the Secretary shall approve any zoning ordinance or any amendment to any approved zoning ordinances submitted to him that conforms to the standards contained in the regulations in effect at the time of adoption of the ordinance or amendment. Such approval shall remain effective for so long as such ordinance or amendment remains in effect as approved.

(d) No zoning ordinance or amendment thereof shall be approved by the Secretary which (1) contains any pro-

visions that he considers adverse to the protection and development, in accordance with the purposes of this Act, of the area comprising the national seashore; or (2) fails to have the effect of providing that the Secretary shall receive notice of any variance granted under, or any exception made to, the application of such ordinance or amendment.

(e) If any improved property, with respect to which the Secretary's authority to acquire by condemnation has been suspended according to the provisions of this Act, is made the subject of a variance under, or becomes for any reason an exception to, such zoning ordinance, or is subject to any variance, exception, or use that fails to conform to any applicable standard contained in regulations of the Secretary issued pursuant to this section and in effect at the time of passage of such ordinance, the suspension of the Secretary's authority to acquire such improved property by condemnation shall automatically cease.

78 Stat. 930, 78 Stat. 931.

(f) The Secretary shall furnish to any party in interest upon request a certificate indicating the property with respect to which the Secretary's authority to acquire by condemnation is suspended.

Owners' use of property.

SEC. 4. (a) Owners of improved property acquired by the Secretary may reserve for themselves and their successors or assigns a right of use and occupancy of the improved property for noncommercial residential purposes for a term that is not more than twenty-five years. The value of the reserved right shall be deducted from the fair market value paid for the property.

(b) A right of use and occupancy reserved pursuant to this section shall be subject to termination by the Secretary upon his determination that the use and occupancy is not consistent with an applicable zoning ordinance approved by the Secretary in accordance with the provisions of section 3 of this Act, and upon tender to the owner of the right an amount equal to the fair market value of that portion of the right which remains unexpired on the date of termination.

Hunting and Fishing.

SEC. 5. The Secretary shall permit hunting, fishing, and shell-fishing on lands and waters under his administrative jurisdiction within the Fire Island National Seashore in accordance with the laws of New York and the United States of America, except that the Secretary may designate zones where, and establish periods when, no hunting shall be permitted for reasons of public safety, administration, or public use and enjoyment. Any regulations of the Secretary under this section shall be issued after consultation with the Conservation Department of the State of New York.

SEC. 6. The Secretary may accept and use for purposes of this Act any real or personal property or moneys that may be donated for such purposes.

Sunken Forest Preserve.

SEC. 7. (a) The Secretary shall administer and protect the Fire Island National Seashore with the primary aim of conserving the natural resources located there. The area known as the Sunken Forest Preserve shall be preserved from bay to ocean in as nearly its present state as

possible, without developing roads therein, but continuing the present access by those trails already existing and limiting new access to similar trails limited in number to those necessary to allow visitors to explore and appreciate this section of the seashore.

(b) Access to that section of the seashore lying between the easterly boundary of the Brookhaven town park at Davis Park and the westerly boundary of the Smith Point County Park shall be provided by ferries and footpaths only, and no roads shall be constructed in this section except such minimum roads as may be necessary for park maintenance vehicles. No development or plan for the convenience of visitors shall be undertaken therein which would be incompatible with the preservation of the flora and fauna, or the physiographic conditions now prevailing, and every effort shall be exerted to maintain and preserve this section of the seashore as well as that set forth in the preceding paragraph in as nearly their present state and condition as possible.

(c) In administering, protecting, and developing the entire Fire Island National Seashore, the Secretary shall be guided by the provisions of this Act and the applicable provisions of the laws relating to the national park system, and the Secretary may utilize any other statutory authority available to him for the conservation and development of natural resources to the extent he finds that such authority will further the purposes of this Act. Appropriate user fees may be collected notwithstanding any limitation on such authority by any provision of law.

Shore erosion control. 78 Stat. 931, 78 Stat. 932.

SEC. 8. (a) The authority of the Chief of Engineers, Department of the Army, to undertake or contribute to shore erosion control or beach protection measures on lands

within the Fire Island National Seashore shall be exercised in accordance with a plan that is mutually acceptable to the Secretary of the Interior and the Secretary of the Army and that is consistent with the purposes of this Act.

(b) The Secretary shall also contribute the necessary land which may be required at any future date for the construction of one new inlet across Fire Island in such location as may be feasible in accordance with plans for such an inlet which are mutually acceptable to the Secretary of the Interior and the Secretary of the Army and that is consistent with the purposes of this Act.

Fire Island National Advisory Commission Establishment.

SEC. 9. (a) There is hereby established a Fire Island National Seashore Advisory Commission (hereinafter referred to as the Commission). The Commission shall terminate on the tenth anniversary of the date of this Act or on the declaration, pursuant to section 2(b) of this Act, of the establishment of the Fire Island National Seashore, whichever occurs first. The Commission shall consist of fifteen members, each appointed for a term of two years by the Secretary, as follows:

(1) Ten members to be appointed from recommendations made by each of the town boards of Suffolk County, New York, one member from the recommendations made by each such board;

(2) Two additional members to be appointed from recommendations of the town boards of the towns of Islip and Brookhaven, Suffolk County, New York;

(3) One member to be appointed from the recommendation of the Governor of the State of New York;

(4) One member to be appointed from the recommendation of the county executive of Suffolk County, New York;

(5) One member to be designated by the Secretary.

(b) The Secretary shall designate one member to be Chairman.

(c) A member of the Commission shall serve without compensation.

(d) The Commission established by this section shall act and advise by affirmative vote of a majority of the members thereof.

(e) The Secretary or his designee shall, from time to time, consult with the members of the Commission with respect to matters relating to the development of Fire Island National Seashore and shall consult with the members with respect to carrying out the provisions of sections 2, 3 and 4 of this Act.

Conflict of interest.

(f)(1) Any member of the Advisory Commission appointed under this Act shall be exempted, with respect to such appointment, from the operation of sections 281, 283, 284, and 1914 of title 18 of the United States Code and section 190 of the Revised Statutes (5 U.S.C. 99) except as otherwise specified in paragraph (2) of this subsection.

76 Stat. 1126.

(2) The exemption granted by paragraph (1) of this subsection shall not extend—

(i) to the receipt of payment of salary in connection with the appointee's Government service from any sources other than the private employer of the appointee at the time of his appointment; or

(ii) during the period of such appointment, and the further period of two years after the termination

thereof, to the prosecution or participation in the prosecution, by any person so appointed, of any claim against the Government involving any matter concerning which the appointee had any responsibility arising out of his appointment during the period of such appointment.

78 Stat. 932, 78 Stat. 933.

Appropriation

SEC. 10. There is hereby authorized to be appropriated not more than $16,000,000 for the acquisition of lands and interests in land pursuant to this Act.

Approved September 11, 1964.

APPENDIX B-1

Judgment Appealed From

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Petitioner-Plaintiff,

versus

TWO TRACTS OF LAND IN THE TOWN OF BROOKHAVEN, COUNTY OF SUFFOLK, STATE OF NEW YORK, and SAILORS HAVEN FIRE ISLAND, Inc., et al.,
Defendants.

No. 66 CD 401

Upon the trial of the issues of just compensation before this Court and a Jury, and the verdict of the Jury handed up and docketed on March 28, 1968, and upon all of the pleadings and proceedings heretofore had or filed herein, it is hereby

ORDERED, ADJUDGED and DECREED:

1. That the fair value and just compensation which should be paid by the Petitioner-Plaintiff, United States of America, for the fee simple title to the property, as described and set forth in the Complaint and Declaration of Taking heretofore filed herein, is hereby fixed and determined to be the sum of $375,000.00.

2. That the Petitioner-Plaintiff, United States of America; is hereby granted judgment against Sailors Haven Fire Island, Inc. and Sailors Haven Water Company, Inc. in the sum of $183,500.00, together with interest thereon at the rate of 6% per annum from July 1, 1966 until same is paid or deposited in the Registry of the Court, which sum of $183,500.00 represents the excess of funds withdrawn from the Registry of the Court by said defendants over and above the just compensation herein fixed and determined in Paragraph 1 hereof.

Dated: Brooklyn, New York
April 29, 1968.

/s/ WALTER BRUCHHAUSEN
United States District Judge

APPENDIX B-2

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 473/4—September Term, 1968.

(Argued March 25, 1969 Decided May 26, 1969.)

Docket Nos. 32741/2

UNITED STATES OF AMERICA,

Appellee,

—v.—

TWO TRACTS OF LAND IN THE TOWN OF BROOKHAVEN, COUNTY OF SUFFOLK, STATE OF NEW YORK, SAILORS HAVEN FIRE ISLAND, INC., and SAILORS HAVEN WATER COMPANY, INC.,

Appellants.

Before:

WA[illegible]MAN, MOORE and FRIENDLY,

Circuit Judges.

Appeal by landowners from a judgment of the District Court for the Eastern District of New York, Walter Bruchhausen, *Judge,* in a condemnation by the United States, awarding compensation in an amount contended to be inadequate. Affirmed.

ADOLPH KOEPPEL (Koeppel, Sommer, Lesnick & Ross, Mineola, N. Y.; Irving I. Lesnick, of Counsel), *for Appellants.*

Appendix B-2

ROBERT M. PERRY, Attorney, Dep't of Justice, Washington, D. C. (Glen E. Taylor, Acting Assistant Attorney General; Joseph P. Hoey, United States Attorney, Brooklyn, N. Y.; Peter H. Ruvolo, Ass't U. S. Attorney, Brooklyn, N. Y.; Roger P. Marquis, Attorney, Department of Justice, Washington, D. C.), *for Appellee.*

FRIENDLY, *Circuit Judge*:

By Public Law 88-587, 78 Stat. 92 (1964), Congress authorized the Secretary of the Interior to establish an area to be known as the Fire Island National Seashore. Section 2(a) of the Act stated that "the Secretary is authorized to acquire, and it is the intent of Congress that he shall acquire as appropriated funds become available for the purpose or as such acquisition can be accomplished by donation or with donated funds or by transfer, exchange, or otherwise the lands, waters, and other property, and improvements thereon and any other interest therein," within the prescribed boundaries. Section 2(e) contained rather unusual provisions in respect to condemnation. With an exception not here relevant, "the Secretary shall not acquire any privately owned improved property or interests therein within the boundaries of the seashore or any property or interests therein within the communities delineated on the boundary map mentioned in section 1, except beach or waters and adjoining land within such communities which the Secretary determines are needed for public access to the beach, without the consent of the owners so long as the appropriate local zoning agency shall have in force and applicable to such property a duly adopted, valid, zoning ordinance that is satisfactory to the Secretary."

Appendix B-2

Claimants' property consisted of three segments. According to them one was a parcel of approximately ten acres on the bayside of Fire Island which they had improved with a motel, a restraurant, a grocery store and certain additions to a marina; apparently these improvements were consistent with a zoning ordinance satisfactory to the Secretary. The other two segments were a 20-acre unimproved upland parcel south and east of the improved parcel, and an underwater portion north of the upland contiguous to the marina. Negotiations between the Secretary and the claimants began in 1965, both sides assuming—correctly so far as we can see—that the Secretary could not condemn the improved segment without the owners' consent but could condemn the other two. The claimants rejected an offer of $600,000 for the entire property. On December 6 they addressed a letter to the Secretary consenting to the acquisition of the improved parcel upon condition that the entire property be condemned. They obtained an appraisal from a Mr. Frank Wittman in an amount exceeding $900,000 but the Government, after requesting a reevaluation by Joseph Blake Associates, who evidently had made an earlier appraisal for it, adhered to its $600,000 offer. The claimants likewise stood on their rejection and, on May 2, 1966, the Government, with claimants' consent, vested title to all of the property and paid $558,500 into court as its estimated value, 40 U.S.C. §258a.

At the condemnation trial before Judge Bruchhausen and a jury in the District Court for the Eastern District of New York, Wittman testified to a value of $985,000, and Modica, an expert retained by the Government, to one of $300,000. The jury awarded $375,000. After denying a motion to set aside the verdict or, in the alternative, to allow claimants to withdraw their consent to the taking, the court entered judgment on the verdict.

Claimants' most important claim is that the court erred in refusing to require the Government to produce the Blake appraisal which their attorney had subpoenaed. Before the trial ended, counsel renewed this request along with what could be considered an offer to prove that the Secretary of the Interior had used the appraisal as a basis for obtaining appropriations from Congress. Claimants do not make the broad contention that any appraisal obtained by the Government is receivable in evidence against it, and we would see no possible basis for this.[1] They concede also that the appraisal here at issue would be inadmissible if it had been used by the Government solely for endeavoring to work out a settlement or for determining the amount required to be paid into court. But they argue that it would have been receivable if they could have sustained their offer of proof and point to a number of New York cases allegedly upholding that position.

At the argument we suggested that if in fact a New York court would receive such evidence, F.R. Civ. p. 43(a), which was not called to the attention of the trial judge or cited in the briefs here, might require admission of the report in a federal trial. The answer made by the Government in open court, namely, that federal condemnation is governed solely by F.R. Civ. p. 71A, goes much too far. Rule 71A(a) states that the Rules of Civil Procedure apply to condemnation proceedings "except as otherwise provided in this rule." Nothing in it excludes Rule 43, and the provision in Rule 43(a) requiring adoption of more liberal state rules of admissibility has been recognized as applicable in federal condemnations. See *Westchester*

1. See the rulings denying discovery of opinions concerning value, in *United States* v. *19.897 Acres of Land in the Town of Islip*, 27 F.R.D. 420 (E.D.N.Y. 1961), and *United States* v. *284,392 Square Feet of Floor Space*, 203 F. Supp. 75 (E.D.N.Y. 1962).

County Park Comm'n v. *United States*, 143 F. 2d 688, 694 (2 Cir. 1944); *United States* v. *25.406 Acres of Land*, 172 F. 2d 990 (4 Cir. 1949).

Two of the four reported New York cases that claimants have cited are not in point. In *Port Authority Trans-Hudson Corp.* v. *Hudson & Manhattan Corp.*, 27 A.D. 2d 32, 276 N.Y.S. 2d 283, 288-89 (1st Dept. 1966), modified on other grounds, 20 N.Y. 2d 457, 285 N.Y.S. 2d 24 (1967), the Appellate Division disapproved a ruling by the trial judge refusing to allow an appraiser called by the owner to be cross-examined on the basis of prior lower appraisals made for the owner's trustee in bankruptcy by the witness' own firm. Although *Matter of the City of New York (Bleecker Street)*, 43 Misc. 2d 173, 250 N.Y.S. 2d 664 (Sup. Ct. N.Y. Co. 1964), held that appraisals by the City, where there was "no indication that the appraisals sought were prepared exclusively for litigation, and, even if they were prepared with litigation in mind, this was not the dominant purpose of their preparation." 250 N.Y.S. 2d 666, were subject to discovery before trial, the court did not rule that the studies would in fact be proper evidence. This leaves *Brooklyn Bridge Southwest Urban Renewal Project*, 50 Misc. 2d 478, 270 N.Y.S. 2d 703 (Sup. Ct. N.Y. Co. 1966), and *City of Buffalo* v. *Strozzi*, 54 Misc. 2d 1031, 283 N.Y.S. 2d 919 (Sup. Ct. Erie Co. 1967), which followed it.[2]

In the *Brooklyn Bridge* case, the late Justice Geller recognized that, in addition to the two circumstances under which claimants concede that an appraisal made for an adverse party on condemnation is inadmissible, the rule in New York is that, absent unusual circumstances, one party may not even call an expert who had rendered an opinion to an adverse party but has not been produced

2. Appellants also refer us to Varney, The Use of Prior Appraisals in Condemnation Cases, 40 N.Y. State Bar J. 37 (1968), citing various unreported cases.

as a witness. *Grigliano* v. *Levi*, 24 A.D. 2d 591, 262 N.Y.S. 2d 372 (2d Dept. 1965); see also *People ex rel. Kraushaar Bros. & Co.* v. *Thorpe*, 296 N.Y. 223 (1947). Cf. *Barrus* v. *Phaneuf*, 166 Mass. 123, 44 N.E. 141 (1896); *Ramacoti* v. *Boston Redevelopment Authority*, 341 Mass. 377, 170 N.E. 2d 323 (1960); *Boynton* v. *R. T. Reynolds Tobacco Co.*, 36 F. Supp. 593, 595 (D. Mass. 1941); 8 Wigmore, Evidence §2203(2) (McNaughton rev. 1961). He held, however, that in the case before him an appraisal by an expert retained by New York City but not called by it as a witness was subject to subpoena at the trial because the City had used the appraisal as a basis for obtaining federal aid. 42 U.S.C. §1452. Claimants contend that the district court should have reached the same result if they could have shown that the Blake appraisal was used as a basis to secure appropriations from Congress for the Fire Island National Seashore.

We disagree—even if, which we would not regard as by any means certain, the New York Court of Appeals should ultimately follow the lower court decisions the claimants have cited to us. The framers of the general direction in F.R. Civ. p. 43(a) to receive evidence admissible "under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held," if these favor the reception of evidence barred by a federal rule, could hardly have had in mind the exceedingly specific question what constitutes an adoption by the United States of an appraisal made by an outsider for a Government agency contemplating condemnation. It is altogether clear, indeed claimants concede, that the "estimated compensation" paid into court by the United States is not admissible to contradict a lower value to which a Government witness testifies at trial. *United States* v. *9.85 Acres of Land in Hampton, Va.*, 183 F. Supp. 402, 404-05 (E.D. Va. 1959), aff'd, 279 F. 2d 890 (4 Cir. 1960); *Evans*

v. *United States*, 326 F. 2d 827, 829-30 (8 Cir. 1964). Yet the amounts paid into court would often reflect appraisals previously obtained, as seems likely to have been true here, and if policy forbids admission of the result, it likewise forbids admission of the source. Moreover, while federal agencies have a duty to give Congress as accurate a notion of the cost of a project as they feasibly can, certainty is impossible and the agencies doubtless recognize it to be better to err on the high side rather than the low. While an error on the high side will mean only that some of the appropriation will not be used,[3] one on the low side may involve the Government in a project that Congress would not have authorized if properly apprised of the facts. In submitting an appraisal to the appropriation committees of the Congress, the executive branch should not have to run the risk of having this used against the Government if subsequent investigation shows it to have been too high. To consider such submission an adoption sufficient to render the appraisal admissible against the United States would thus be counter to governmental policy. On such a matter, despite the general direction of F.R. Civ. p. 43(a), the United States, condemning land throughout the nation, should not be affected by a contrary position taken by a particular state. The circumstances which led us to advocate deference to the state law of fixtures in *United States* v. *Certain Property in the Borough of Manhattan*, 306 F. 2d 439, 444 (2 Cir. 1962), 344 F. 2d 142, 144-45 (2 Cir. 1965), are absent here.

Claimants' second argument is that they relied on the $600,000 offer in giving consent and should therefore be allowed to withdraw this. But there was no agreement, as

3. Since it appears that this would also have been the consequence of an excessive estimate in the *Brooklyn Bridge* and *Strozzi* cases, we do not rest our decision on a distinction between a representation by one "sovereign" to another and one by an executive to a legislative agency of the same government.

there might have been, that the only issue to be litigated in the condemnation was the difference between the Government's $600,000 offer and the claimants' higher demand. Claimants, who were represented by experienced counsel, must have realized that just as they were free to seek $900,000 or even more, the Government was equally entitled to seek to establish a value lower than $600,000 if it believed in good faith that the property was not worth that much. If a makeweight were needed, one could be found in the fact that there was no difference between the two appraisers that the value of the improved property, the only parcel concerning which claimants' consent was vital, was $100,000.

Claimants' final point, directed to the validity of Modica's appraisal, raises no issues that were not appropriate for determination by the jury.

Affirmed.

APPENDIX C

Extracts from Testimony

(27) Mr. Koeppel: Judge, while your Honor is taking a recess, I had one small legal point that I think probably would be advisable to discuss at this time. I will make it in the nature of an application to the Court.

Sometime before the trial I served several subpoenas upon various persons and parties, most specifically a subpoena upon Joseph Blake. (28) Associates. Joseph Blake, upon information and belief, has made an appraisal in this case upon which I believe the Secretary of the Interior and National Park Service relied in going to the Congress of the United States to apply for funds in this proceeding.

Now, under the cases, if your Honor please—and I see Mr. Modica in Court, I am assuming that Mr. Modica has also made an appraisal for the Department of Justice; I am further assuming in this application, not seeing Mr. Blake in Court, that Mr. Modica will testify for the Government, and not Mr. Blake; I am assuming he will testify from his appraisal and not Mr. Blake's—I have requested that Mr. Blake's appraisal be present in Court.

I am also assuming that Mr. Modica's appraisal will be less than that of Mr. Blake. Now, based on that assumption, Judge, and the production of the appraisal, I am requesting that that appraisal be admitted in evidence, assuming it is higher than Mr. Modica's as an admission against interest.

Now, I have appropriate cases on that, if (29) your Honor would like them.

Mr. Ruvolo: Again, your Honor, I anticipated Mr. Koeppel's request in view of the fact that I too was served with a subpoena, and I prepared this memorandum of law, which I would like to submit in behalf of the Government on this point.

Appendix C

Pursuant to the subpoena I do have Mr. Blake's appraisal report available. However, I must object to it on the grounds that until Mr. Blake takes the stand it is inadmissible.

The Government cannot be held bound by any appraisal —by any appraiser that it may hire to do work for it unless that appraiser's report is adopted and made a part of its case.

Now, if Mr. Blake takes the stand of course his report would be available, but if we do not adopt Mr. Blake's report, I must object to turning it over to Mr. Koeppel, because it can do no good. He cannot use it for cross examination of any other appraiser that is called upon.

(30) The Court: Well generally speaking, without examining this particular memorandum, you can't put documents into evidence or statements by people without having supporting testimony by the person who makes it, and all the way through we find parties attempting to put in statements of this party or that party, and it's true, just as Mr. Ruvolo points out, it may be admissible to this extent: If the witness takes the stand and if he doesn't subscribe to what he says in the statement, why, on cross examination you may read any parts of it which show deviation from his oral testimony.

Mr. Koeppel: May I be heard your Honor?

The Court: Yes.

Mr. Koeppel: I made my opening application short, but that doesn't mean I didn't attempt to do my homework on the cases. I am familiar with the two cases cited by Mr. Ruvolo. I don't believe we are at issue.

I think there is one primary issue, and if I might, if your Honor please, there are—and I have to refer to New York cases because I am not quite so sure in a matter of this type whether or (31) the Federal Law does or does not, but the only control on this thing, since it is

procedural—I assume it might be—and I point out these New York cases to your Honor for this reason: They hold, just so we clarify this—they say the Government no more than the claimant should be held to account if he hires three or four appraisers and says: "Make me an appraisal." Three of them come back in, he says "I don't like one, two and four, I will use three."

The Government has a perfect right to reject one, two and four, pay for them but not adopt them in a sense they make them their own.

The same for myself, I may have sent two or three appraisers out. That's quite clear.

What is also quite clear is that if the Government sends Mr. Blake out to appraise this property, as he did, and he does it solely for the purpose of litigation, under the New York cases, solely for the purpose of settlement or litigation, and then Mr. Ruvolo in his infinite wisdom as trial attorney says "I do not wish to use the appraisal of Mr. Blake which was made for the Park Service, I want my own appraiser," then the (32) New York cases hold that to be inadmissible.

But if that appraisal is vouched for in any other fashion—and in the New York cases, of which I will give your Honor the citations—they were city cases which urban renewal, so that the appraisals were made by the city, and the city then under the urban renewal statute had to go to the Federal Government for Federal funds, and they took that appraisal and said "Look, give us X dollars for this acquisition."

The Courts in that instance have held that if that appraisal vouchsafed for by the Government to a Federal Agency, where they obtained funds—and in this case I say then the Courts have held that that is an admission against interest.

Nothing goes in. I don't want the appraisal. The number goes in as an admission against interest, unless Mr.

Blake can take the stand. But the appraisal itself is admissible.

Now, if Mr. Ruvolo or Mr. Peel will assure me that the appraisal made by Mr. Blake was not utilized by the Interior Department before the Congress of the United States to obtain funds for the acquisition, and therefore was never (33) approved except as a litigating material, then I will drop my argument.

Now the cases on that, Judge, if I might cite them, Brooklyn Bridge Southwest Urban Renewal—

The Court: Just a minute,

Mr. Koeppel: Now this is the latest, and I think a very clear exposition by Judge Geller, Special Term.

The Court: What's that citation?

Mr. Koeppel: It is 270 N. Y. Supp. 2nd, 703, cited at 50 Miscellaneous Second 478.

Now this is the clearest exposition of the law by Judge Geller, here in 1966.

There are *In Re Park* and Park addition also. This is by Judge Markiewitz, 250 N. Y. Supp. 2nd 664, and 43 Miscellaneous 2nd 173.

Now, those two cases point out what I told your Honor. In one case one was made for Urban Renewal and they felt that the city had vouchsafed for it by going to the Congress or to the Urban Renewal Agency in Washington. And in the second cited case the Department of Estimate had used the appraisal for some previous (34) official purpose, and then when they came to the trial the Court held that they were both admissible.

Now, I have subpoenaed Mr. Peel, who was the local head of the National Park Service. Now, if indeed this appraisal was not used for purposes to obtain the funds from the Congress, and I can be assured of that, I will drop my application.

Mr. Ruvolo: I must point out first of all your Honor that Federal Law controls here, we are not dealing with New York Law.

The Court: Yes, I would think—

Mr. Koeppel: I just point that out, your Honor.

The Court: Yes, I would think procedural law, the Federal Law would control.

Mr. Koeppel: I submit I read the Federal cases and they don't hold anything to the contrary.

Mr. Ruvolo: That's number one. Point number two is that any agency if it is attempting to appraise land would probably hire various—would probably hire various appraisers to go out (35) and make reports to give them an estimate as to how much funds they would need for a project. That does not necessarily mean that that appraisal report is evidence as to the value of the land.

That could be done for any number of reasons.

If, as Mr. Koeppel is claiming, this was used for negotiation purposes for the basis of a settlement offer or something, then we claim it is inadmissible.

Mr. Koeppel: I concede that.

Mr. Ruvolo: Because no settlements or even discussions of settlement are admissible into evidence.

Mr. Koeppel: I concede that latter point, Judge. It's only on the former point that I cited the New York cases.

I submit to the Court there are no federal cases precisely on that point. Mr. Ruvolo's cases don't touch upon that at all.

So the reason I cited the New York cases knowing there was a procedural problem, is that it seems to be to the better view in view of the (36) fact that there are no federal decisions. If the municipality or the sovereign vouchsafes that appraisal—and Mr. Ruvolo admits that even in the Federal cases if they vouchsafe or stand be-

hind it—and in this case the Courts of New York have held where they have used it to obtain other funds then it is an admission against interest.

The Court: Let's explore that for a moment.

Let's assume what you say, that his appraisal was mentioned or submitted to the Government Agency for the purposes of securing funds.

Mr. Koeppel: Obtaining funds.

The Court: And later on in further exploration and investigation of the case they find that the weight of evidence that they have secured would indicate that that figure is not correct; what then? Is somebody bound by an early investigation of a situation and unable to accept something that he seems to feel has more weight?

Mr. Koeppel: You are asking me, your Honor?

(37) I can answer that question. Is that a rhetorical one, do you want me to answer it?

The Court: Well I—

Mr. Koeppel: Yes, I will answer that, your Honor. The Courts have held, and I maintain rightly, that it is an admission against interest. That doesn't mean they can't explain it.

Assuming it came about and was a gross error and they went to the Agency and said for example "We need $4,000,000 to acquire X parcels of land on Fire Island." Now, you are saying to me as an example that suppose there was an error of we will assume—a downward error, that they only needed $2,400,000 and they obtained $1,600,000 extra. Now, it was an error—it happens.

Now, I can then, under the New York cases I cited to your Honor put in as a specific appraisal, as an admission against interest, that at one time this Government vouchsafed an appraisal and stood up to the Congress and said "Give me money based on it for $4,000,000."

And now they are coming into Court saying it, is worth $2,400,000.

(38) That doesn't tie them forever, but it is an admission against interest. They may come in and explain the error satisfactorily.

The Court: Well let me explore this a little further. The Government pays into the Court a certain amount of money that they consider sufficient for this land. Why then isn't that evidence in the case?

Mr. Koeppel: That is clearly an offer of settlement and compromise. That is clear, and the cases so hold. Even the discussion by Judge Geller and Judge Markiewitz. And there are four cases that Mr. Ruvolo cited to me in the last trial which specifically that their offers of settlement an—or compromise are inadmissible we can't quarrel with that. Otherwise the Federal Government would never make an offer.

The letter accompanying the estimate of damages says it is an estimate. And if Mr. Blake's appraisal was made solely for that purpose, I withdraw my application, because it's an offer of compromise.

But I am making a fine point, Judge, which was made in these other cases.

(39) The Court: Have your point.

Mr. Koeppel: But I recommend the two New York Cases, your Honor, because I think there is sound reasoning.

The Court: I will consider that along with the other point.

* * *

(1037) Mr. Koeppel: Judge, I want to make the record clear in connection with my request, which your Honor has already denied, to bring in the other appraisal, the appraisal made by Blake.

The Court: Yes?

Mr. Koeppel: Now, I want to make sure the record is clear and I understand your Honor's ruling on that: Is your Honor ruling that should claimant demonstrate that this appraisal was used to obtain the funds from the Congress and that having demonstrated that your Honor still rules that it is inadmissible?

(1038) If that is so, I will rest my case, but I want to establish that.

The Court: I rule it is inadmissible.

Mr. Koeppel: But specifically even if it were used to obtain funds from the Congress?

Mr. Ruvolo: There are other grounds for its being objectionable.

Mr. Koeppel: I want to establish that—

The Court: I say it is inadmissible, it is incompetent, irrelevant and immaterial.

Mr. Koeppel: But is it to your Honor's knowledge that that may have been used for obtaining funds from the Congress?

The Court: I rest with the statement I have made.

Mr. Koeppel: Well otherwise I have to bring in the one I subpoenaed and ask him questions, Mr. Piel, that is unless your Honor will rule specifically that even if I proved it was used to obtain the funds it is still inadmissible, then I don't feel, unless that is so, that I have made the proper record of that.

(1039) The Court: I would rule it is still inadmissible.

Mr. Koeppel: You would still rule that it is inadmissible even if used to obtain funds from the Congress?

The Court: Yes.

* * *

Appendix C

Before:

Hon. J. Bruchhausen.

* * *

(2) The Clerk: Civil Motion, United States of America versus Two Tracts of Land, Brookhaven, etc.

Mr. Koeppel: Ready, Your Honor.

Mr. Ruvolo: Ready, Your Honor.

The Court: All right, you may proceed.

Mr. Koeppel: If your Honor pleases, this is a motion to set aside the verdict of the jury in the Sailors Haven case, which was rendered on March 21, 1968, in this action, on the following grounds:

It set forth three grounds, and with the Court's permission I would like to raise them separately.

The first is that the trial court erroneously refused to permit the introduction into evidence of a previous appraisal made on behalf of the Department of the Interior, the National Park Service.

On information and belief, this appraisal was in the neighborhood of $600,000, and was made by Joseph J. Blake Associates, at the request of the National Park Service, (3) sometime prior to the date of the vesting of title on May 2, 1966, and was, thereafter, utilized by the Department of the Interior to obtain funds from the Congress of the United States, to acquire title to the Sailors Haven Property, and others.

At the trial the defendant, pages 27 through 39 of the stenographer's minutes, and again on pages 1037 through 1039, subpoenaed the regional head of the National Park Service, Leslie Piel, to appeal and produce the aforementioned appraisal.

Mr. Piel appeared on the first day of April and turned over the appraisal to the United States Attorney. The application at the trial, as well as this time, is based on

the following theory of law as supported by the cases that we cite below:

The law concerning the admission of prior appraisals in condemnation cases, is that where the condemning authority has vouched for this prior appraisal in a legal sense, rather than merely utilizing same for litigation or settlement purposes, then (4) and in that event, the appraisal takes on an aura of authenticity and may be produced, and the amount of said appraisal may be introduced into evidence as an admission against interest.

We have cited, in support of this proposition, certain New York State cases. We have researched the federal law on the subject, and to date I have found no cases which are contrary to the New York cases.

A review of the federal cases cited by Mr. Ruvolo earlier, indicated that all of these cases were decided on the question of the deposit made by the government; and in each case, that is the deposit in court accompanying the declaration of taking, and in each of these cases the court—and I believe correctly—have held that these appraisals or offers were merely offers of compromise and estimates of value, and as such are not admissible.

I take no issue with that. I cited it, Your Honor, and I cite it again, in re Brookhaven Bridge Southwest Urban Renewal (5) Project.

The Court: Have you a brief there?

Mr. Koeppel: If Your Honor please, I have cited these cases previously in a brief, but I think for the record, since this is an oral motion and I want it of course to become part of the record, I have not rebriefed these. But Your Honor has already had these citations; and I will put it in again:

Borough of Manhattan, City of New York, 270 N. Y. S. 2d. 703; 50 Misc. 2d. 478.

In that case, decided at special term by Judge Geller, the whole subject of prior appraisals in condemnation was explored, and it was there held that where such prior appraisal, if indicative of a higher value as of the title vesting date, than that testified to by the condemnation rules expert, would be admissible as an admission against interest.

In that case, Judge Geller found that the prior appraisal requested by the condemnee to be introduced, was prepared as (6) part and parcel of an urban renewal project involving federal assistance. He found that, pursuant to such federal law and regulations, such prior appraisals were submitted to the federal authorities as part of the application for a loan, which was then advanced on account of the final costs adjusted by the court.

He further found, and I quote:

"Such appraisals, vouched for by the city in submitting them for resulting appraisal values, to obtain a loan from the federal government, should be admissible to the extent that any appraised value therein of a particular damage parcel constitutes an admission against interest with respect to the condemnor's appraised value testified to by an expert offered by the city." Judge Markowitz, also sitting in Special Term, New York County, in 1964, in the case of in *re*: Park and Park addition in the Borough of Manhattan, City of New York, 43 Misc. 2d. 173, 250 N. Y. Sub. 2d. 664, permitted the introduction of a prior (7) condemnor's appraisal into evidence on the ground that the prior appraisal was prepared by the Department of Real Estate of the City of New York, and submitted to the board of estimate to aid the board of estimate in performing its functions in acquiring the property.

Where, as in all other cases, the judge overruled the condemnor's contention that the appraisal was made for litigation purposes, he found that it was obviously uti-

lized in the proper exercise of the governmental function, and he ruled it was admissible as an admission against interest.

Now, there, Judge Markowitz cited Matter of the City of New York (Marshall) 16 App. Div. 2d. 570, 577, 229, N. Y. Sup. 2d. 947, 954.

In that case, the Appellate Division held that the testimony of such an expert at a prior trial, different from that used at the second trial, was an admission against interest, against the city, since the city had adopted this appraisal previously.

In a recent article in the New York State (8) Bar Association Journal in January of 1968, John Varney, a condemnation attorney in Syracuse, discusses this problem in an article he entitles, "The Use of Prior Appraisals in Condemnation Cases."

Mr. Varney reviews the New York Law and cites the case of Casey vs. the State of New York, Claim No.: 43506, an unreported decision dated February 8, 1967, for the proposition that an appraisal, produced in response to the issuance of a subpoena duces tecum, was properly receivable in evidence as an admission against the state, where it appeared from the testimony that the state, in that case, had adopted the prior appraisal by vouching for it and submitting it to the federal government in connection with the request for reimbursement under the Federal Interstate Highway Program.

Mr. Varney, at page 42, cites two unreported cases. I might state that one of them is now reported, but both of which involve prior appraisals utilized in Urban Renewal Cases, and in both cases the condemning authority was (9) ordered to produce these appraisals.

The first case is the City of Watertown versus Jerry's Watertown Restaurant and Hotel, Inc. This was decided on May 25, 1967, in the Supreme Court, County of Jefferson, by Judge Lynch.

Appendix C

I have no citation for Special Term, nor do I have the citation for the Appellate Division, Fourth Department, but the case was recently affirmed; no opinion.

Another case in the Fourth Department, which is still pending before that tribunal, is the City of Binghamton vs. the Arlington Hotel, Inc., Supreme Court, County of Broome. This decision was handed down August 15, 1966 by Judge MacAvoy, and is currently before the Fourth Department.

The Court: Well, I think it would suffice for you to cite the cases. I can read the cases just as well as a lawyer can.

Mr. Koeppel: I am not reviewing those cases, Your Honor. I just reviewed the first two cases.

I say a review of the cases cited by (10) the United States Attorney in this action, holds nothing to the contrary. In fact, the government cites or states, at page 1 of their memorandum, and I quote—that is the memorandum cited to Your Honor at the trial:

"The other appraisal reports cited herein are inadmissible into evidence since their validity was not approved, endorsed or vouched for by the petitioner, the United States of America."

The Court: I think what we have here is in the nature of reargument on that proposition. That matter was presented in the brief, previously, and under our rules of a court there is no argument taken on motions for reargument.

Mr. Koeppel: I am not moving to reargue, Judge. I am moving to set aside the verdict.

The Court: I say it is in the nature of a reargument.

Mr. Koeppel: I just would like to continue for the record, Judge, with Your (11) Honor's permission.

And again at page 2, I quote from the government's brief:

"Neither the opinions of value, the reasoning by which they were reached, nor any other matters referred to have been accepted, approved or vouched for by the United States."

Now, it is obvious that this appraisal if it were used merely for the purpose of litigation or settlement, would be inadmissible, and I have conceded this point several times.

The Court: I have your point. You are repeating yourself on this. You are making a distinction. I have had a great deal to do with condemnation.

Mr. Koeppel: I understand, Your Honor.

The Court: You are making a great deal of distinction between appraisals submitted, with other appraisals that may have come along or been procured by the government.

Mr. Koeppel: Yes, Your Honor, but if Your Honor will bear with me, I am making this statement for the record.

I understand Your Honor has other things (12) to do. I don't have this in the form of a motion, and the only way I can get it before this court, and possibly the Appellate Division, is if Your Honor will bear with me.

The Court: All right.

Mr. Koeppel: No one here is questioning the right of the condemnor having one, four, five, ten or one hundred appraisals made for the purpose of litigation. And in accepting only one, in spite of the fact that that one may be the lowest, but where the government elsewhere vouches for such an appraisal, and as in this case to the Congress of the United States, on the grounds that they need some $600,000 to acquire this property, and then they come into the court with an appraisal of one half the amount, it is not only unfair to the claimant and the congress, but to all the people in the country.

Certainly, this jury was entitled to know that such an appraisal was utilized by the Secretary of the Interior to obtain the funds from the congress. The amount of such appraisal (13) is admissible in evidence. If there were valid reasons as to why it was not used, the government could have explained this to the jury. The jury, as in all condemnation cases, was uninitiated in the various sophistications and subtleties of valuations in condemnation proceedings. However, the admission into evidence of an appraisal at twice the figure used by Mr. Modica in this case, would have been a significant and important factor for them to know.

It is respectfully submitted that the failure of this court to permit the introduction into evidence of the prior appraisal was erroneous and prejudicial.

* * *

Now, I come to the third point, judge, which I think is most significant.

The Court: I thought you were on the (20) third point.

Mr. Koeppel: No, the second point was to strike the testimony of Modica, which is prejudical.

The Court: I will ask you to stop within the next six minutes.

Mr. Koeppel: This is completely new to this court, and has not been raised before. This is an application to set aside the jury's verdict and cancel and annul the declaration of taking and the complaint, and vacate the title vesting order in this action, on the grounds of bad faith, fraud, mutual mistake, negligent misrepresentation, inadvertent misrepresentation, unilateral mistake, and breach of contract.

The court, today, as it sits on the bench making notes, is unacquainted with the circumstances surrounding the

declaration of taking as it concerns this property. A short history is then important:

On December 6, 1965, the claimant in the above-entitled action sent the following letter to the Secretary of the (21) Interior. With the court's permission, I will read it:

Letter addressed to the Honorable Stewart Udall, Secretary of the Interior of the United States of America, on the stationery of the claimant.

"Dear Mr. Secretary, this letter will serve as the formal consent of the undersigned corporations that certain improved real property consisting of approximately ten acres, owned by them, between the communities known as Point of Woods and Cherry Grove at Fire Island, Suffolk County, New York, West of the Brookhaven Town Park, be condemned by the Secretary of the Interior.

"As we read section two-E and two-F of the Fire Island National Sea Shore act"—which is in evidence, Your Honor, as exhibit D, and I will quote that section in a few moments.

"* * * such improved property may not be condemned by the Secretary, without the consent of the owner.

"The undersigned Corporations"—and (22) it lists the three of them "* * * are the fee owners of the above-described real property, while Sailors Haven Construction Corporation holds a lease in and to such property.

"We are advised that additional real property owned by the undersigned, immediately contiguous to the subject property to the east, and land now under water to the north and east, are also to be condemned, but that the consent of the owners to their acquisition is not required, since said properties are not improved.

"The consent contained herein is made subject to the following conditions and is wholly contingent thereon:

"One: the entire tract of real property owned by the undersigned corporations at the above described locations

must be condemned (approximately fifty four acres, including land now under water);

"Two: the filing of the declaration and the vesting of title shall not be effective prior to January 15, 1966, but every effort (23) shall be made to file such declarations and vest title as soon thereafter as practicable:

"Three: The undersigned shall be given twenty days written notice of the proposed date of the filing of taking and the vesting of title, by certified mail directed to 33 Cove Road, North Port, New York.

"We would appreciate your early attention to the contents of this letter."

Signed, "Sailors Haven, Fire Island, New York," by Herman Selden, President and a copy to Mr. Piel, National Park Service, and the Honorable Henry Schmidt.

As the court can see from this letter, the improved portion of claimant's property was condemned by consent. This came about by reason of the fact that the National Seashore act—and here, this is 2-E and 2-F, Judge, and I will just read the appropriate provisions. I am quoting section 2-E from the Act:

"With one exception the secretary shall not acquire any privately owned improved property or interest therein, within the boundaries of (24) the seashore, without the consent of the owners."

The next sentence says: "The sole exception to this is, he has a right to condemn improved property in an eight-mile area from the easterly boundary of the Brookhaven Town Park," which was to the east of our property, "to the westerly boundary of the Smithtown area Park."

This area specifically is where the secretary had no authority to acquire improved property, including Sailors Haven.

Prior to the writing of this letter to the secretary of the Interior, there were negotiations between the National

Park Service and the claimant concerning the possible acquisition of portions of the property or the entire property. The letter of December 6, 1965, which I have just read to the court, was the go ahead signal for the secretary of the Interior to acquire claimant's property by consent, since it had no right to do so without such consent.

(25) Thereafter, on the 17th of December 1965, the Department of the Interior replied to the letter of December 6th. This comes from Washington and it is signed by Jackson Price, Assistant Director of the Department of the Interior, National Park Service. It is addressed to Mr. Herman Selden at 33 Cove Road, Northport, New York:

"Dear Mr. Selden: Thank you for your letter of December 6th, addressed to the Secretary to the Interior Udall, wherein you give your formal consent to condemnation of Fire Island real estate holdings in the Corporations of which you are President.

"It is our understanding that you are to obtain a report of value from an independent appraiser, selected by you, and that you would then again confer with National Park Service Land Acquisition personnel.

"It is our earnest desire to attempt to negotiate with you on the 'fair market value' concept. In the event negotiations are not mutually agreed upon, we will then consider initiating condemnation proceedings (26) as set forth by your formal consent.

"Our staff will be ready to negotiate with you as soon as you notify them of the date.

"Thank you again for your fine attitude."

Now, here we are told to obtain an independent appraiser and attempt to negotiate a fair settlement. This was done, and a meeting was set up on February 15, 1966, and we met.

Appendix C

On March 3, 1966 I wrote the following letter to the Secretary of the Interior:

The Honorable Stewart Udall, Secretary of the Interior, United States of America, Washington, D. C.:

"Re: Fire Island and Sailors Haven.

"Dear Mr. Secretary, reference is made to our letter of December 6th, addressed to you, and your reply of December 16th. In your letter of December 16th, you requested that we obtain a report of value from an independent appraiser, and then confer with your land acquisition personnel.

"Please be advised that we have obtained (27) such a report from Frank Wittman, and that on Tuesday, February 15th, we met with your Mr. Piel, and Mr. Schmidt, and presented our appraisal. All portions of the same were made available to Mr. Piel at that time.

"Thereafter, Mr. Piel requested the Blake Associates to re-evaluate the government's appraisal, in the light of Mr. Wittman's appraisal. Unfortunately, this re-evaluation by your Mr. Blake resulted in a final offer to the claimant of $600,000.

"In as much as this offer was made to Mr. Selden by Mr. Lee several months ago, and in view of the fact that Mr. Wittman's appraisal is in excess of $900,000, we are unable to accept the offer made by Mr. Piel.

"We have, therefore, regretfully arrived at an impasse and we reiterate our request in our letter of December 6th, that the government initiate condemnation proceedings.

"Many thanks for your fine attitude, and please accept our sincere regrets that we were not able to arrive at a mutually (28) agreeable price."

Copies were sent to W. W. Lee, Henry Schmidt, Lester Piel, Herman Selden and Frank Wittman.

Thereafter, and on May 2, 1966, this condemnation by consent took place. As the court can see, this is not a

typical condemnation proceeding where the sovereign had the absolute, unquestionable power to condemn. This was purely a contractual situation, and it is respectfully submitted that by withholding from the court at this time the appraisal made by Blake Associates, the United States of America has breached its contract, especially where they come in with an appraisal of exactly half that amount.

Now, whether bad faith, duress, fraud, misrepresentation, whether negligent or innocent, or just plain mutual mistake of fact was at play in this situation, I submit, if Your Honor please, makes no difference.

The facts clearly emerge that the government breached its agreement to condemn this property at a figure of $600,000 or more. (29) There was no room in the contractual concept for the government in this situation to reduce the $600,000 figure and still maintain its right to condemn.

I now ask this court to set aside the declaration of taking, the vesting title order, and I hereby tender into the registry of this court the sum of $557,500 with interest from June 1st, the date of its receipt from June 1st, the date of its receipt by claimant, June 1, 1966, and request that an order be made by this court by divesting the federal government of title to claimant's property and executing a deed in fee to claimant for these holdings.

I am aware that the government has made certain improvements, and I don't expect a windfall from such a deed. We are prepared to pay, upon competent proof, the fair market value of any improvements as of today's date, in addition to the monies offered above.

The Court: All right, I will hear your adversary.

Mr. Koeppel: Excuse me, Judge. I (30) made a photostatic copy of the letters I read from, for the court. They will be in the record.

Mr. Ruvolo: As Your Honor pointed out, Mr. Koeppel's grounds for his motion, his first ground, is the refusal to admit the Blake appraisal, was merely a reargument of that made several times during the course of the trial. I notice that in his opening statement Mr. Koeppel conceded that if this report was used for settlement purposes, or in the interest of litigation, then he would concede that it was not admissible in evidence.

In his last argument, he notes that the Blake report was used in the meeting which he attended on February 15, 1966.

The Court: The same $600,000?

Mr. Ruvolo: The same appraisal report was used for that compromise figure, which was offered to him.

He also goes to great lengths to distinguish—it sounds as if it is all lumped into one argument—that the report itself should go (31) into evidence, when he discusses his cases.

The cases all have held—not all have held but the cases have held—that in instances where it is wished to put the appraiser's report into evidence, the witness must be called and placed on the stand. Now, Mr. Koeppel has acknowledged that we had the appraiser in the court here for him, pursuant to his subpoena. He could very well have called Mr. Blake as his witness, if he was interested in that report. He could have put Mr. Blake on the stand and Mr. Blake would have testified as to his estimate of value. This he did not do.

To ask that merely the figure, without the appraisal report—which he did during the course of the original argument—that Blake's figure be put into evidence is inappropriate, in our opinion. The figure is not vouched for, we still say it is not. The competency of the expert was not admitted. He was not put on the stand. His qualifications were not tested. And to merely throw in a figure

would be tantamount to admitting the (32) compromise figure which he got from the Park Service, which was turned down, and it would be tantamount to admitting gross figures which are not admissible.

The compensation estimates are vouched for, using Mr. Koeppel's words, the same way as this appraiser's report would be, because the deposit is based upon some appraiser's report. The deposit is made into this court by the Secretary of the Interior along with the declaration of taking, and if not, and it would appear in even stronger language, because the Secretary deposits it as his estimate of just compensation. And the evidence is clear on that point—a deposit is not admissible into evidence.

The Court: I am not clear. Do they make a deposit in the state courts?

Mr. Ruvolo: Yes, Your Honor, they make a deposit in the state courts.

Finally, the whole argument of Mr. Koeppel's is based upon an opinion of his that this specific report was, "vouched for" by the Park Service, in obtaining funds. (33) There has been no evidence of that in any way.

As far as my own personal knowledge is concerned, the Park Service requested Congress to provide funds, a lump sum fund was provided, and is periodically provided, and the bases for Congress arriving at that figure is unbeknownst to me, and I think there is no evidence in this case to note by what methods it is arrived at.

However, in any event, it still falls within the government, within the confines of the government, as a just settlement, and would be so considered today. And Mr. Blake should have been called by Mr. Koeppel, if he feels he needed that figure.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 492

SAILORS HAVEN FIRE ISLAND, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 14–21) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered May 26, 1969. The petition for a writ of certiorari was filed August 22, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the exclusion from evidence of the report of an appraiser employed by a government agency but not called as a witness invalidates the verdict in a federal condemnation case.

363-301—69

STATEMENT

In 1964 Congress authorized the acquisition of lands on Fire Island, New York for a National Seashore project. The statute required consent of the owners of certain improved properties to condemnation. One of three segments of property owned by petitioners was subject to this limitation. After rejecting an offer of $600,000 for the entire property, petitioners consented to condemnation if all their property was taken, and these proceedings were accordingly filed. Petitioners filed no objection to the proceedings and the parties agreed as to the value of the improved segment. The government vested title and paid $558,500 into court as the estimated value of the premises. After a view of the premises by the jury, extensive evidence was presented in a nine-day trial. Petitioners' appraiser asserted a value of $985,000 and the Government's appraiser expressed an opinion of $300,000; both estimates included $100,000 as the value of the improved parcel. Petitioners also sought to offer in evidence an appraisal report which had been made for the Department of the Interior by Joseph Blake Associates; this report estimated the properties' worth at $600,000. Upon the Government's objection to introducing the report unless Blake was called as a witness, the court excluded the report; Mr. Blake was not called (Pet. App. 23–28). A verdict of $375,000 was returned.

On appeal, as in arguing to the trial court, petitioners conceded that government appraisals used solely for settlement negotiation purposes or for determining the amount of estimated compensation to be deposited with a declaration of taking would not be ad-

missible (Pet. App. 17, 24). Their contention was that the appraisal had been used as a basis for securing an appropriation from Congress, and, therefore, constituted an admission against the interest of the United States (Pet. App. 19–20). Finding that neither federal nor applicable state law supported admissibility on this basis, the courts below held against them.

ARGUMENT

Petitioners' contention that this case involves a question regarding the scope of executive privilege is one made for the first time in this Court, and misrepresents the issues at trial. There was never any question of the government refusing to reveal the Blake report or what the appraisal made in it was. All parties knew of the $600,000 figure, and the government, pursuant to subpoena, had brought both Blake and his report to court and would have offered no objection had petitioners called him as a witness. Pet. App. 23, 42. Petitioners—no doubt for sufficient reasons—did not wish to place Blake on the stand, where his professional qualifications and the manner in which he had arrived at his appraisal would be subject to testing before the jury. It simply wanted to bring the $600,000 figure before the jury, disassociated from the circumstances in which it arose, as a valuation the government had at one point relied on. The government resisted, successfully and correctly, on the ground that this would be tantamount to revealing an offer of compromise. See *Evans* v. *United States*, 326 F. 2d 827, 829–830 (C.A. 8); *United States* v. *Certain Parcels of Land in Arlington County*,

Va., 261 F. 2d 287, 291 (C.A. 4). Thus it was petitioner, not the government, that would have wished to withhold relevant information, that bearing on the credibility of the Blake report, from the jury.

Petitioners' associated claim that they never would have consented to condemnation had they realized that the government's compromise offer of $600,000 did not establish the minimum possible compensation for their property is equally without merit. At most, it establishes faulty judgment on their part in the particular negotiations and trial proceedings of this case. Nowhere does it appear that the government represented to them that its compromise offer represented the lowest amount of compensation that they could expect to receive, or would be the basis of the government's case at any trial. Common sense makes clear that any offer thus presented could not hope to succeed. Petitioners gambled their ability to secure a larger award against the government's case, and lost.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
ROGER P. MARQUIS,
Attorney.

SEPTEMBER 1969.

U. S. GOVERNMENT PRINTING OFFICE: 1969